

# CANADIAN CLASS ACTIONS AND FOREIGN JUDGMENTS

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The number and scope of class actions in Canada has expanded immensely since the early nineties when Ontario became the first Canadian common law jurisdiction to introduce a class action statute. Today, seven of Canada's thirteen provinces and territories have legislation which establish a legislative regime for the initiation of class proceedings. Canada's Supreme Court has also sanctioned the class action approach in those jurisdictions where comprehensive class action legislation is not found. Clearly, Canadian courts see class actions as an effective way to deal with common issues of fact or law. The evolution of the Canadian jurisprudence has presented a number of challenges including how Canada deals with the recognition and enforcement of foreign class action settlements and judgments. Recent decisions relating to these issues are of importance to U.S. practitioners seeking to have American class action resolutions recognized in Canada.

Understanding the Canadian approach to class action proceedings is helpful to appreciating when foreign class action judgments will be recognized in Canada. Certification in the Canadian context generally requires the following:

\* *The pleadings must disclose a cause of action.* This is a relatively low threshold in the certification process. Only where it is plain and obvious that no cause of action would arise on the facts as assumed in the Statement of Claim would a motion to certify be denied.

\* *An identifiable class of two or more persons.* Unlike the U.S. requirement that a class must be so numerous that joinder is impractical, the Canadian regime only requires an identifiable class of two or more persons. The class, however, must be capable of clear definition. In Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, the Supreme Court of Canada noted that this was very important as it "identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment."

\* *The claims of the class must raise common issues.* Common issues are necessary to resolve each class member's claim. It is not necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. In Quebec, if there is a *prima facie* case raising common issues of fact and law, the courts are typically obliged to certify the class action. This is different from the United States where classes are defined using a merit based definition referencing damages suffered.

\* *Class proceedings are the preferable procedure to resolve common issues.* This issue is often assessed in light of the stated objectives of class proceedings:

access to justice, judicial economy and behavioural modification. This involves a determination as to whether a class action is fair, efficient and manageable as well as a comparative analysis as to whether the class proceeding is preferable to other possible means of resolution. In British Columbia, Alberta and Newfoundland, specific legislative provisions require consideration of whether the common issues predominate the individual issues when assessing what is the preferable procedure.

\* *A representative plaintiff that will adequately represent the class.* The existence of an individual, who is not in a conflict position and who will fairly represent the plaintiff class is essential to advancing a class action. Canada has a “loser pay” system for most civil litigation. Some jurisdictions having class action legislation encourage the objectives of class proceedings by relieving a losing representative plaintiff from paying costs. Such relief is not found in Ontario and Alberta. Under Ontario’s Class Proceedings Act, a representative plaintiff may be required to pay unless the issue was novel or in the public interest. Such an award was made in Kerr v. Danier Leather (2006), 20 B.L.R. (4<sup>th</sup>) 1 (O.C.A.) a case addressing alleged misrepresentation in a prospectus. In Kerr, the Court of Appeal ordered the unsuccessful plaintiffs to pay the defendant’s costs at trial. This case was considered by the Supreme Court of Canada in a hearing held in March of this year. The decision has not yet been released. Under Alberta’s Class Proceedings Act, costs are awarded on the same basis as any other proceeding.

The global nature of commerce necessarily invites the existence of multi-jurisdictional class proceedings. Canadian courts have grappled with the issues associated with national class actions within Canada but have also addressed the recognition of class action judgments and settlements emanating from foreign jurisdictions like the United States. The Ontario Court of Appeal addressed this issue in Currie v. McDonald’s Restaurants of Canada Ltd. (2005), 74 O.R. (3d) 321 (C.A.). Decided in 2005, that case was initiated by a Canadian resident who complained of wrongdoing associated with a promotional game offered to customers of McDonald’s in Canada. McDonald’s moved to prevent that action from proceeding on the basis that an Illinois Court had approved a class action settlement that purportedly included international customers of McDonald’s including those residing in Canada.

Invoking the principles of comity, the Court of Appeal recognized that Ontario law “should give effect to foreign class action judgments.” The nature of class action proceedings though require certain conditions to be met before that recognition will be extended. First, the Court found that there must be a real and substantial connection in favour of the foreign jurisdiction. In the Currie case, it was found that the alleged manipulation of prizes occurred in the United States thereby denying Canadian customers prizes. A real and substantial connection was established. Second, the foreign process must afford the non-resident plaintiffs a certain degree of procedural fairness. In its judgment, the Court of Appeal stated,

“Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with the Illinois jurisdiction and alleviate concerns regarding unfairness.” Highlighting the importance of notice, the Court found that the U.S. judgment was not binding in Canada because the notice provided was inadequate. In reaching this decision, the Court relied upon expert evidence that suggested that the Canadian notice reached only 29.9% of Canadian adults who would frequent burger restaurants. This distribution was not sufficient to ensure those implicated by the proceeding were given an adequate opportunity to opt-out. This underlines the necessity of taking steps to ensure proper notice is given in the jurisdiction where you are attempting to have the resolution enforced. The third condition that must be satisfied is that the foreign plaintiffs are adequately represented, although the Court did not focus on this aspect of the test. Other cases have suggested that Canadian interests would be adequately represented if qualified, experienced counsel in class action proceedings had carriage of the matter in the originating jurisdiction.

The Currie decision is also being applied to the recognition of class action judgments within Canada. In 2006, the Quebec Superior Court refused to enforce two class action settlements emanating from the Ontario courts. In HSBC v. Hocking, [2006] Q.J. No. 507 (S.C.) the Quebec court found that the Ontario court lacked jurisdiction over Quebec plaintiffs based on the lack of a real and substantial connection to the Ontario jurisdiction. The adequacy of the content of the notice was central in Lepine v. Societe canadienne des postes, [2005] Q.J. No. 9806 (S.C.). In that case, the Court was focused on the adequacy of the notice itself and not whether it had been properly advertised and promoted.

More recently, a global settlement of class proceedings brought against Nortel Networks and negotiated in the U.S. was considered in three separate proceedings by Courts in Ontario (Frohlinger v. Nortel Networks Corporation, [2007] O.J. No. 148 (Ont. S.C.)), British Columbia (Jeffery v. Nortel Networks Corp., [2007] B.C.J. No. 90 (S.C.)) and Quebec (Association de protection des épargnants et investisseurs du Québec (APEIQ) c. Corporation Nortel Networks, [2007] J.Q. No. 447 (C.S.)). The U.S. class proceeding was brought in the United States District Court, Southern District of New York and alleged that between October, 2000 and February, 2001 that Nortel Networks (and certain of its officers) issued materially false and misleading press releases and financial statements relating to the financial performance of the company. While the classes in the U.S. proceedings were worldwide by definition, separate class proceedings had been commenced in Ontario, British Columbia and Quebec. The U.S. settlement had been achieved through a two day mediation before Senior United States District Judge Robert W. Sweet with the view that further discussions would subsequently be held with Canadian class action counsel (who did not participate in the U.S. mediation) to have them adopt the global resolution. Canadian Courts were being asked whether they would approve the

U.S. global settlement in the Canadian proceedings as they are required to do under Canadian class proceeding legislation.

The Canadian Courts' analysis focused on the reasonableness of the settlement to Canadian plaintiffs. As part of this analysis, the Courts look to the prospects for success, the process of fact investigation, the terms of the settlement, the experience of counsel, litigation expense, the recommendation of any neutral parties, the number and nature of objections made, communication with the plaintiff class and the dynamics of the negotiations including the positions adopted by the parties.

The settlement, which required Nortel to pay significant compensation and to adopt changes in their approach to corporate governance, was approved by the Canadian Courts. It was determined that the amount of compensation paid by Nortel was close to that which it was able to pay absent a trial. The Judges approving the settlement in the Canadian class actions were also comforted by the process under which the global settlement had been achieved. In that regard, the experience of counsel, the extensive nature of the investigations into the claims and the involvement of an experienced U.S. Judge led the Canadian Courts to conclude that the settlement was achieved as a result of hard bargaining.

Justice Winkler of the Ontario Superior Court in the Frohlinger case did highlight the differences in class definition in Canada and the United States. Canadian jurisprudence rejects the merit based definition found in the United States preferring to define membership in a class by connection to common issues only. At the same time, Canadian Courts attempt to ensure that the class is not overly broad. Canadian Courts have suggested that under a merit based approach, only those who would receive compensation would form part of the class. Those who did not receive compensation would be free to pursue other forms of litigation with respect to the common issues in dispute. This would not result in finality in the proceedings. In the context of the Nortel suit, Justice Winkler found that "practical differences" between the two classes were "more apparent than real". The decision also notes that thus far, Courts have been fairly adept at accommodating the differences in approach between jurisdictions in addressing class action issues, but added that it would be useful if more formal protocols were developed to deal with these types of cases.

The Nortel cases also highlight that in Canada, class proceedings relating to the same subject matter may be commenced and certified in a number of different provincial jurisdictions. This is in stark contrast to the more streamlined American model, where a case is assigned to a single District Court Judge. Recently, some effort has been made to achieve a more streamlined system through the creation of a national database of class proceedings. The database is administered by the Canadian Bar Association. While the database project was intended to be voluntary, practice directions have been issued in three

provinces having a high volume of class proceedings (British Columbia, Ontario and Quebec) requiring lawyers to register new class proceedings in the database. This initiative is seen by many lawyers as a positive step towards a system of national class actions in Canada.

The Currie decision and subsequent cases give us some guidance on the likelihood of extra-territorial enforcement of class proceedings in Canada. The importance of a real and substantial connection, the adequacy and clarity of notice from an opt out perspective and the adequacy of representation in the class proceeding are fundamental issues which U.S. counsel must address should they wish to envelop Canadian plaintiffs in the resolution of U.S. based class proceedings. The Nortel decisions are also important in that they highlight some of the differences in the U.S. and Canadian approach. While those differences were not material to the outcome in approving the Nortel global settlement, these cases also suggest that the wisest approach is one which is sensitive to the position of Canadian class members and treats those members in a manner which ensures procedural fairness and adequate participation in any negotiated outcome.

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### **Sidebar – Enforcing Canadian Class Action Judgements in US Courts**

Given their relatively small numbers, it is not surprising that the issue of enforcing Canadian class action judgments has yet to produce a significant body of case law in the United States. Though the constitutional Full Faith and Credit Clause does not apply judgments of other countries' courts, American courts have traditionally taken a generous attitude towards the recognition and enforcement of foreign judgments, and there is no reason to think that this attitude would be any different for class actions from Canada.

Virtually all States enforce money judgments of other countries' courts and more than half of them do so under the terms of a *Uniform Money Judgment Enforcement Act*. These Acts provide that any foreign judgment that is final, conclusive and enforceable in the forum in which it was rendered is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money." Even in states that lack a Uniform Act, a respect for international comity is the prevailing rule. In federal courts, the enforcement of foreign judgments is governed by similar principles of comity as set by the by the United States Supreme Court in *Hilton v. Guyot* 159 U.S. 113 (1895). .

There are, however, a number of notable exceptions to federal and state courts' willingness to enforce foreign judgments that are broadly similar to those that

apply in Canada. In a rough analogy to the Canadian real and substantial connection test, under the *Uniform Act*, a foreign judgment will not be recognized if the court issuing it lacked jurisdiction over the subject matter. Additionally, a judgment will not be recognized under the Acts if there has been a violation of due process or procedural fairness. The Supreme Court also insisted on procedural safeguards in *Hilton v. Guyot* that in many ways mirror the concerns expressed by the Ontario Court of Appeal in *Currie v. MacDonald's Restaurants of Canada Inc.* The Supreme Court held that that a foreign judgment may be recognized only where “there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice...”

Several States, and in theory at least, the federal courts, also require reciprocity with the issuing jurisdiction before a foreign judgment can be recognized. While this may cause significant problems for judgments obtained in many European jurisdictions that traditionally look askance at the American class action regime, this requirement is unlikely to cause many problems for Canadian judgments. Much of Canada has a class action system that operates on similar, though not identical, principles to the American one and even in cases, like *Currie*, where Canadian courts decline to recognize a US judgment, they do so for reasons that American courts can readily recognize as legitimate. Consequently, though there are significant differences between the two countries class action regimes, on the issue of recognition and enforcement there are also important symmetries.